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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

IN THE MATTER OF ROBERT LEE ALLMAN,

TOBER SAIFER SHOE COMPANY,
Petitioner

VS.

ROBERT LEE ALLMAN, AND
JAMES LARRY POSTON,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Robert Allman and James Poston operated a shoe store in Austin, Texas. One of many suppliers to the Shoe Store was Tober Saifer Shoe Company. Tober Saifer sued Poston and Allman in state court using the shotgun offense made possible by word processors. As it is typical of many small businessmen who find themselves on the ropes, they agreed to a judgment, one which made no recitations about any of the elements of 11 USC Section 523 pertaining to dischargeability.

Subsequently, both Poston and Allman sought relief under Chapter 7 of the Bankruptcy Code wherein Tober Saifer raised the issue of nondischargeability.

Tober Saifer filed a complaint in the bankruptcy proceeding objecting to the discharge of its debt on the basis that it was one "for obtaining money, property, or services by false

pretenses other than a statement respecting financial condition." Upon trial of the complaint before the bankruptcy judge, Tober Saifer relied solely on the "false pretense" recitations of its state court petition; it offered no evidence to support the false pretense allegations in its complaint, and it offered no evidence that any evidence of that nature was considered by the state court judge. Indeed it did not because it could not. There was simply no fraud in the case which could be proved in any forum. But if it could raise its illegitimate and completely unfounded pleading to a judgment entitled to the sanctuary of res judicata, then it would have created the collection lawyer's paradigm--a grain of truth would have been converted into a nondischargeable unassailable pound of flesh.

SUMMARY OF ARGUMENT

The U.S. Bankruptcy Court has exclusive

jurisdiction to determine the dischargeability of a debt in a bankruptcy proceeding. No state court has jurisdiction to determine the issue of dischargeability, and hence 28 USC 1738 does not extend full faith and credit to any state court judgment to the extent such judgment purports to decide the issue of dischargeability. Being exclusively a creature of federal law, federal preclusion and collateral estoppel rules govern the effect of a state court judgment when it is sought to be utilized by any party before the bankruptcy court on the issue of dischargeability.

REASONS FOR DENYING THE WRIT

1. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THE SUPREME COURT AS TO THE PROPER APPLICATION OF 28 U.S.C. 1738.

The Petitioner cites Allen V. McCurry, 449 U.S. 90, 96 (1980) for the proposition that the federal courts should apply state law in determining the collateral estoppel effect of

prior state court adjudication. In the Allen case, the state criminal trial court refused, under Fourth and Fourteenth Amendment challenges, to supress certain evidence seized in a narcotics raid. In a subsequent civil suit against the arresting officers under 42 U.S.C.S. 1983, this court sustained the District Court's use of collateral estoppel to prevent the defendant from relitigating the search-and-seizure question adversely decided against him in the state court.

The difference in the Allen case and the instance case is readily apparent. No citations are necessary for the proposition that both the state and federal courts have jurisdiction to decide Fourth Amendment issues. In this case, however, only the federal courts, have jurisdiction to decide the issue of dischargeability of a debt in bankruptcy. The bankruptcy court has exclusive jurisdiction to

decide dischargeability questions, and no state court judgment may stand as a res judicata bar on that issue. Brown v. Felsen, 422 U.S. 127 (1979). Since the dischargeability issue cannot be adjudicated in state court, it is patently ridiculous to apply state law in determining the collateral estoppel effect of that which cannot be adjudicated in the state forum. This Court has already rejected Petitioner's reasoning in Simpson V. Shuler, 722 F2d 1253 (5th Circ. 1984) by denying the petition for writ of certiorari on October 1, 1984.

2. TEXAS LAW DOES NOT COMPEL ISSUE PRECLUSION.

Petitioners extensive recitation of state law regarding pleadings is illustrative of the point so clearly missed or avoided in Petitioner's case. This Court has essentially determined that questions of collateral estoppel must have a contextually appropriate answer. In

Brown V. Felsen, supra, and in all cases emanating therefrom, it is clearly the law of the land that 1) state courts do not have authority to try issues of dischargeability, and 2) bankruptcy courts are entitled to consider the circumstances of judgments taken while debtors are in dire straits.

The only case cited by Petitoner which related to a bankruptcy case was Wilhite V. Adams, 640 SW 2d 875 (Tx Sup 1982). Whilhite is poor authority for Tober Saifer's position because the state court honored the fully and actually litigated findings of the bankruptcy court. In any circumstance in which the "actually litigated" test is set forth, Petitioner's argument crumbles.

3. THE DECISION BELOW DOES NOT RAISE SIGNIFICANT AND RECURRING PROBLEMS OF COLLATERAL ESTOPPEL UNDER 28 U.S.C. 1738 IN BANKRUPTCY DISCHARGEABLILITY QUESTIONS.

The only recurring and significant problem

which the Fifth Circuit's decision raises is that it prevents collection lawyers from taking one the easy way. It forces them to actually prove up their dischargeability case in the bankruptcy court.

The Fifth Circuit's application of collateral estoppel fully insures that issues honestly litigated and determined in prior state court proceedings may be considered by the bankruptcy court in determining dischargeability issues. In appropriate instances the state court judgment may be conclusive. Carey Lumber Co. v. Bell, 615 F. 2d 370 (5th Cir. 1980). The application of federal preclusion and collateral estoppel rules requires that the dischargeability issue be fairly addressed, and the application of these rules is consistent with the concept of exclusive federal jurisdiction.

Recognizing this, the Petitioner urges this

Court to abandon it adopted in Brown V. Felsen, supra. We are told that the reasons for exclusive federal jurisdiction are not present today. We are further assured that there is "no danger of abuse in a pre-bankruptcy suit," when it is obvious what kind of abuse Petitioner seeks to achieve with its pre-bankruptcy suit. Absent the exclusive jurisdiction restraint, unwitting state court judges could determine the dischargeability issue by entering default judgments which parrot completely unfounded fraud pleadings in a petition.

The Fifth Circuit's decision governing the role of a state court default judgment in the determination of the dischargeability of a debt in a bankruptcy proceeding adequately and fairly protects the debtor from the unfounded fraud claim, and insures that the defrauded creditor have his day in court. The party which presently exists is derived from the exclusive

federal jurisdiction in dischargeability questions, and any departure from the exclusive jurisdiction rule would only serve the unscrupulous.

CONCLUSION

For these reasons, a writ of certiorari should not issue to review the judgment of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 16th day of November, 1984, three copies of this Brief in Opposition was mailed via First Class U.S. Mail to Don L. Baker, BAKER & PRICE, 314 W. 11th Street, Suite 500, Austin, Texas 78701, Attorney for Petitioner, and further certify that all parties required to be served have been served.

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